



STATE OF DELAWARE

PUBLIC SERVICE COMMISSION

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November 1, 2016

MEMORANDUM

TO: The Chair and Members of the Commission
FROM: Robert J. Howatt, Executive Director
SUBJECT: RESPONSE TO TIME SENSITIVE REGIONAL AND FEDERAL REQUESTS

Background

As you are aware, Delaware is one of the few states that has a part-time Commission which must take all regulatory actions in an open public forum. All our surrounding states have full time Commissioners, several of which are permitted to rule from behind closed doors. When those Commissions elect to intervene in federal energy cases, or to file comment, the Commissioners are typically available to react and give consent on a daily basis. Unfortunately, such is not the case in Delaware.

By way of history the Executive Director at the Public Service Commission has had no authority to convey Commission views. Requests for Commission consideration have almost always come before the Commission at a scheduled meeting. On February 22, 2012, in response to Executive Director O'Brien's request to intervene in a FERC complaint related to New Jersey's request for new generation, the Commission agreed and authorized Mr. O'Brien to intervene in the case. Apparently, based on the March 8, 2012 minutes of the Director's Comments, the Commission unanimously approved the Executive Director to intervene in cases as would be necessary to ensure opportunity for the Commission to participate in the proceeding.¹

¹ Minutes of the March 8th meeting
5. Director's Comments:

The pace of federal energy regulation continues to accelerate, not only for interventions, but for the Commission to sign-on to other State's comments and pleadings. In many instances, the filing party wishes to convey the agreement of multiple state commissions to add emphasis to their requests in a timely fashion. Most recently, New Jersey requested a sign-on to a request for reconsideration of FERC's order on ARRs and FTRs in docket EL16-6 with a two day notice. Since the request expressed the views of Delaware Staff and the New Jersey Commission and did not bind the Commission to any action or specific requirement, I did authorize my signature for sign-on. However, that authorization may well have been beyond my authority for which this humble Executive Director begs your forgiveness.

Moving beyond my current spurious assumption of authority, I would ask this Commission exactly how they would like to proceed under similar time sensitive circumstances. Unfortunately, under the current FOIA and APA requirements, this Commission is unable to take any actions on public business in private. Under current statutory requirements this Commission would need to participate in an emergency session to respond to time sensitive requests, subject to a minimum of 24 hour notice.

In examining the Delaware Code and this agencies administrative code I see two reasons why this Commission could consider an alternative approach. First, responding, commenting or signing on to other agencies documents does not appear to constitute an agency action under FOIA definition.² Secondly, the Commission's own rules do not preclude it from prescribing different procedures to apply to specific proceedings.³ In view of the need for this Commission to respond to time sensitive regional and federal requests I would suggest the following potential motion:

Consistent with our prior determination in 2012, the Executive Director is authorized to file timely interventions in federal energy cases and on related issues where the

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- a. William O'Brien briefed the Commission on FERC Docket No. EL11-23, for which Staff initially was seeking Commission approval for a late-filed intervention. However after the initial posting of this item on the agenda, Staff is withdrawing this request as the case before FERC is now over so there is no longer a need to intervene. As a result of the intervention request, Mr. O'Brien discussed possibly having intervention's in federal proceedings listed as an Administrative Matter on the agenda.

Commissioner Winslow was in favor of providing Staff the ability to intervene stating that it would make the process more efficient and allow Staff to be better involved.

After discussion, Commissioner Winslow moved to grant the Executive Director the ability to intervene on behalf of the Commission for federal filings. Commissioner Clark seconded the motion. The motion carried 4-0 with Chair McRae abstaining.

² (2) "Agency action" means either an agency's regulation or case decision, which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind or the grant or denial of relief or of a license, right or benefit by any agency or court, or both.

³ .1.2 Nothing in these rules shall preclude the Commission, in the exercise of its statutory duties and where circumstances reasonably require, from prescribing different procedures to apply to specific proceedings.

resulting outcome may have significant impact on Delaware, Delaware utilities and/or Delaware ratepayers. In addition, the Executive Director is further authorized to sign on behalf of this Commission, any federal or regional time sensitive requests that reflect the position recommended by expert Staff, agreed with by the Executive Director and which does not bind the Commission to any specific agency actions or responses, subject to Commission ex post review at a properly noticed public meeting.